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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

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| PARAMOUNT DEVELOPERS & CONTRACTORS, INC.,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>MANUFACTURERS BANK,<br><br>Defendant and Respondent. | B232360<br><br>(Los Angeles County Super. Ct. No. BC378519) |

APPEAL from orders of the Superior Court of Los Angeles County. Soussan G. Bruguera, Judge. Reversed and remanded.

Huron Law Group, Jeffrey Huron, Phu G. Nguyen; Morrison & Foerster, Miriam A. Vogel, Benjamin J. Fox for Plaintiff and Appellant.

Clark & Trevithick, Philip W. Bartenetti; Brown White & Newhouse, George P. Schiavelli for Defendant and Respondent.

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Paramount Developers & Contractors, Inc. (Paramount) appeals after a demurrer to Paramount's second amended complaint was sustained without leave to amend. Although we find that Paramount's second amended complaint did not accurately describe the judgment Paramount seeks to enforce in this action, we determine that the demurrer should have been overruled because Paramount adequately alleged that defendant Manufacturers Bank (the Bank) did not comply with all of the judgment's terms. Accordingly, we reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

### The Prior Lawsuit

This dispute has a long history. In 1983, the Bank entered into a 20-year written lease agreement with Paramount[1] for office space in a building owned by Paramount at 6565 Sunset Boulevard (the premises). According to Paramount's pleadings, prior to execution of the lease, the premises contained small retail shops and multi-tenant offices. The office space was significantly altered to accommodate the Bank.

A dispute arose when the Bank[2] indicated its intent to vacate the premises and sought to sublease its space to an insurance company in 1998. Although the lease agreement provided that the Bank had a right to sublease the premises (upon prior written consent of Paramount, which consent could not be unreasonably withheld), Paramount did not agree to the proposed sublease arrangement. In response, the Bank began reducing its monthly lease payments by the amount it would have received from the intended sublessee. Paramount brought suit against the Bank in November 1999, alleging that it breached the lease agreement by failing to pay all amounts owing.

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[1] The lessor named in the agreement was not Paramount. Paramount is the general partner of the successor-in-interest to the named lessor.

[2] The Bank assigned its lease to M.B. Administrative Services Corporation (MBASC), which is a codefendant. References in this opinion to the Bank are also to MBASC.

Nearly a year later, in September 2000, Paramount filed a separate complaint against the Bank for declaratory relief. In that second case, Paramount alleged that a controversy had arisen between itself and the Bank regarding the effect of section 5.03(d) of the lease agreement.[3] According to the complaint, Paramount contended that the provision required the Bank "to restore the space to [its] original (pre-1983) condition, at a cost now estimated at $1.5 Million," while the Bank contended that section 5.03(d) required "only surrender of the Premises broom clean in their post-conversion condition." The prayer asked for "a declaration that [section 5.03(d)] of the Lease requires defendants to restore the Premises to their pre-1983 condition," and "for such other and further relief as the Court deems just."

Paramount's actions for breach of the lease agreement and declaratory relief were consolidated, and a bench trial before Judge Robert H. O'Brien commenced in May 2001. The court issued its judgment on October 1, 2001. The judgment generally favored the Bank, as it was determined that the Bank was entitled to deduct from its monthly lease payments the amounts that it would have received from the proposed sublessee. As for the declaratory relief claim, the judgment stated: "Defendants must, at the appropriate time, prepare a plan to comply with 'restoration' in accordance with paragraph 5.03(d). The plan shall include Defendants' removal of 'leasehold improvements' and restoration

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[3] Section 5.03(d) stated: "Tenant's machinery, equipment and trade fixtures, including Tenant's vault door, automatic teller machines, and night depositories, shall remain the property of Tenant and shall be removed by Tenant upon the expiration or other termination of the Lease. Except for Tenant's machinery, equipment and trade fixtures, all Alterations to the Premises made by or on behalf of Tenant shall, upon the expiration or other termination of this Lease, become Landlord's property and shall be surrendered with the Premises, unless Landlord shall elect otherwise not less than thirty (30) days prior to the expiration, nor more than ten (10) days after any other termination, of this Lease. If Landlord so elects, such Alterations, decorations, floor coverings or fixtures, made by or on behalf of Tenant in the Premises, as Landlord may select, shall be removed by Tenant, at its sole cost and expense, at or prior to the expiration of the Lease term, and the Premises shall be restored and repaired to the original condition, reasonable wear and tear excepted. In the event of other termination, any such removal shall be accomplished within thirty (30) days after such termination."

of the premises that were subject to 'alterations' to a condition prior to the alterations, which at least means reinstalling the partitions, if that is what Plaintiff wants. Defendants are not required to re-do plumbing, electrical or HVAC which do not meet current codes; nor, are they permitted to redo plumbing, electrical or HVAC systems that simply comply with their original condition at the time of the commencement of the lease if in doing so would be contrary to any current law, regulation, ordinance, or building code, etc. Defendants need not 'restore' anything that would be currently contrary to any law, regulation, ordinance or building code, etc. Further, Defendants are not required to 'restore' by comparing or matching to any other part of the premises. [¶] Plaintiff and Defendants must, in good faith, reasonably review and consider proposals by one another for the restoration. The manner in which Defendants are obligated to do so must be judged by reasonableness in light of all the circumstances, not the least of which are the passage of time, building, zoning and other legal requirements, availability of materials and a practical good faith consideration by all parties as to the need for an absolute restoration or some alternative."

Both parties appealed. On February 5, 2004, this Court, in an opinion by Justice Michael G. Nott, affirmed the judgment. (*Paramount Developers & Contractors, Inc. v. M.B. Administrative Services Corporation et al.* (B155076) [nonpub. opn.].)

In December 2004, Paramount brought another action. The complaint in that action alleged that the Bank breached the lease agreement by failing to restore the premises as required by section 5.03(d). Following the Bank's filing of a demurrer, Paramount dismissed its action without prejudice in September 2005.

**The Instant Action**

Paramount filed the instant action against the Bank in October 2007. Following the denial of a motion for summary judgment, Paramount moved to amend its complaint in October 2009. The Bank filed a demurrer to the first amended complaint, which was sustained.

Paramount then filed a second amended complaint, which contained two causes of action: "Enforcement of Judgment Pursuant to Code of Civil Procedure Section 337.50"

(*sic*) and "Breach of Judgment." The allegations largely consisted of a selected summary of the parties' litigation history, with referenced pleadings attached as exhibits. Primarily, Paramount's second amended complaint rested on the allegation that the October 2001 judgment obligated the Bank: "(a) to create a restoration plan 'at the appropriate time;' (b) to engage in good faith and reasonable review and exchange with Plaintiff of each parties' restoration proposals; and (c) to complete an absolute restoration of the Premises or some alternative." According to Paramount, the Bank "failed and refused to satisfy its obligations under the Judgment," and "breached the Judgment by, among other things, failing and refusing to restore the Premises as required by the Judgment."

The Bank brought a demurrer, arguing that it had complied with all obligations imposed by the judgment. The trial court sustained the demurrer, this time without leave to amend. Paramount now appeals from the ensuing order dismissing the case.

## DISCUSSION

An appellate court reviews the ruling sustaining a demurrer de novo, exercising independent judgment regarding whether the complaint states a cause of action as a matter of law. (*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115.) We give the complaint a reasonable interpretation, treating the demurrer as admitting all material facts properly pleaded, but not assuming the truth of contentions, deductions or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.) A demurrer tests the legal sufficiency of the complaint. (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) As such, we are not concerned with the difficulties a plaintiff may have in proving the claims made. (*Desai*, at p. 1115.)

The portion of the October 2001 judgment addressing Paramount's suit for declaratory relief (filed in September 2000) is central to this appeal. In the instant lawsuit, Paramount contends that it seeks to enforce the pertinent terms of that judgment. According to Paramount, the judgment imposed affirmative obligations on the Bank in the form of injunctive relief, requiring the Bank to take three actions: (a) create a restoration plan; (b) engage in a good faith and reasonable review of each parties'

restoration proposals; and (c) restore the premises to a condition approximating the condition in which they existed prior to being altered for the Bank.

Conversely, the Bank argues that the relevant terms of the judgment were merely declaratory. The Bank contends that the judgment addressed the effect of the relevant provision of the lease agreement, but that it did not impose any affirmative obligations. Thus, according to the Bank, the alleged breach was a breach of the lease agreement, not the judgment, and Paramount's recourse was to sue on the lease agreement itself. The Bank posits that Paramount is trying to avoid a time-barred breach of contract claim by fashioning its lawsuit as being on the judgment rather than the lease agreement.

We find that neither party's argument is quite correct. The October 2001 judgment was attached as an exhibit to the second amended complaint, and therefore we may look to its terms to determine what obligations it imposed. Any inconsistencies between Paramount's allegations concerning the judgment and the language of the judgment itself are resolved by giving greater weight to the judgment. (See *Mead v. Sanwa Bank California* (1998) 61 Cal.App.4th 561, 567-568.)

A review of the judgment shows that it imposed two (not three) affirmative obligations on the Bank: (i) to, "at the appropriate time, prepare a plan to comply with 'restoration' in accordance with paragraph 5.03(d);" and (ii) with Paramount, to, "in good faith, reasonably review and consider proposals by one another for the restoration." Although the judgment stated that these acts were to be done in preparation for restoration, the judgment did not actually require the Bank to undertake any construction or similar restoration work.

This result was not anomalous considering that the superior court was ruling on a declaratory relief action. Code of Civil Procedure section 1060 explains the purpose of declaratory relief: "Any person interested under a . . . contract . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action . . . in the superior court for a declaration of his or her rights and duties . . . including a determination of any question of construction or validity arising under the . . . contract." Furthermore, the "court, in granting declaratory relief, has the power to award

additional relief." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 901.) In its September 2000 complaint, Paramount asked for a "declaration that [section 5.03(d)] of the Lease requires defendants to restore the Premises to their pre-1983 condition," and "for such other and further relief as the Court deems just." In the October 2001 judgment, the superior court interpreted section 5.03(d) and imposed two obligations on the Bank: to prepare a plan at the appropriate time, and to review and consider proposals. When ruling on the declaratory relief claim, the court was not required to enter a judgment imposing affirmative obligations to physically restore the premises, and indeed it did not do so. Pursuant to its declaratory function, the court provided some general guidance on the scope of restoration requirements embodied in section 5.03(d)—including that restoration would include "removal of 'leasehold improvements'" and "reinstalling the partitions," but not "plumbing, electrical or HVAC which do not meet current codes"—but the court did not affirmatively require that any physical restoration work be done.

The superior court's concurrent 2001 statement of decision reflected the fact that its ruling on the scope of restoration was merely declaratory. The decision was explicitly based on the fact that neither party had, as of 2001, terminated the lease, and "defendants do not yet have the obligation to meet the 5.03(d) restoration requirements." The court noted that "defendants have a restoration obligation and not a reconstruction obligation under the Lease," but "[i]t is not clear, however, to what condition the Premises are to be restored." As with the judgment, the statement of decision laid out some general guidelines of work included and not included in the scope of "restoration," but did not provide for a specific restoration plan. Rather, the statement of decision ordered that judgment be entered as follows: that the Bank must "at the appropriate time, prepare a plan to comply with 'restoration' in accordance with paragraph 5.03(d) as generally described above. [Paramount] shall be required to, in good faith, confer with [the Bank] relating to restoration needs." No other affirmative relief pertaining to restoration was ordered.

This Court's 2004 opinion (*Paramount Developers & Contractors, Inc. v. M.B. Administrative Services Corporation et al., supra*, B155076) does not alter our analysis. Paramount argues that the law of the case doctrine mandates a finding that it may sue in the instant case for the Bank's failure to complete a restoration of the premises. Paramount is incorrect. The law of the case doctrine applies only with respect to prior appellate opinions in the same case. (*Daar & Newman v. VRL International* (2005) 129 Cal.App.4th 482, 488.) This is not the same case.

In any event, Paramount relies on a single sentence from the prior opinion that (perhaps inartfully) summarized the superior court's decision. Reading the sentence in the context of the opinion, however, reveals that this Court was simply reviewing the superior court's construction of the lease agreement.[4] This one sentence cannot be deemed to give rise to a claim for failure to complete restoration. (See *Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498 [dictum is not law of the case].) The prior opinion did not impose additional obligations on the parties. On the contrary, the judgment was affirmed without any modification.

Nevertheless, in this appeal, we must reverse the trial court's order of dismissal based on the demurrer. At the demurrer stage the trial court must take the allegations as

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[4] Paramount relies on the second sentence of a paragraph on page 14 of the opinion, in a section of the opinion titled: "V. Whether the trial court erred in finding that Bank and MBASC had a construction obligation under the lease." The entire paragraph stated: "We conclude that the trial court's construction of the lease was supported by substantial evidence. The trial court required the Bank and MBASC to restore the premises in accordance with part 5.03, subdivision (d), including removal of leasehold improvements and restoration of the premises that were subject to alterations to their condition prior to the alterations. While this might include reinstalling the partitions, the Bank and MBASC were not required to redo plumbing, electrical or air conditioning systems which did not meet current codes; nor were they required to redo plumbing, electrical or air conditioning systems that complied with their original condition at the time of the commencement of the lease if doing so would be contrary to current codes. Nor were the Bank and MBASC required to restore anything that would be contrary to any current codes." (*Paramount Developers & Contractors, Inc. v. M.B. Administrative Services Corporation et al., supra*, B155076.)

true. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 328, fn. 11.) As alleged in the second amended complaint, the October 2001 judgment required the Bank (i) to, "at the appropriate time, prepare a plan to comply with 'restoration' in accordance with paragraph 5.03(d);" and (ii) with Paramount, to, "in good faith, reasonably review and consider proposals by one another for the restoration." Giving the second amended complaint a reasonable interpretation, it adequately alleges that the Bank failed to comply with these two requirements. The trial court was not permitted to find that the Bank had complied because, in ruling on a demurrer, the court may not make factual findings. (*Mink v. Maccabee* (2004) 121 Cal.App.4th 835, 839.)

**DISPOSITION**

The order of dismissal and order sustaining the demurrer are reversed, and the matter is remanded for further proceedings not inconsistent with this opinion. Each party is to bear it own costs on appeal.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.